

*lit.*

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

WEST BAY CONSTRUCTION,	)	
	)	PCHB NO. 92-11
Appellant,	)	
	)	
v.	)	FINDINGS OF FACT, CONCLUSIONS
	)	OF LAW AND ORDER
OLYMPIA AIR POLLUTION	)	
CONTROL AUTHORITY,	)	
	)	
Respondent.	)	

This matter came on for hearing on May 29, 1992, in Lacey, Washington, before the Pollution Control Hearings Board with Board Member Annette McGee in attendance and Administrative Law Judge John H. Buckwalter presiding. Board Chairman Harold S. Zimmerman could not be in attendance but has reviewed the record.

At issue was Notice of Civil Penalty Assessment, dated January 7, 1992, issued by the Olympia Air Pollution Control Authority (hereinafter OAPCA) to West Bay Construction (hereinafter West Bay) imposing a civil penalty of \$3,000 with \$1,000 suspended for causing or allowing a fire on West Bay property in violation of OAPCA Regulation No. I.

Appearances were:

Patricia J. Ingersoll, sole proprietor, pro se for West Bay.

Fred D. Gentry, attorney, for OAPCA.

Proceedings were recorded by Leah M. Yates, C.S.R., of Spanaway, Washington and were also tape recorded. Witnesses were sworn and

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

1 testified, exhibits were admitted and examined, and arguments of  
2 parties were heard. From these, the Board makes these

3 FINDINGS OF FACT

4 I

5 Patricia J. Ingersoll is a general contractor dba West Bay  
6 Construction of which she is and has been the sole proprietor since  
7 February of 1987.

8 West Bay is the owner and developer of Woodfield Estates which is  
9 located on the east side of Hoffman Road S.E. in the City of Olympia,  
10 Thurston County, State of Washington.

11 Woodfield Estates is platted for approximately 67 lots, 30 of  
12 which are in various stages of construction, all by West Bay as  
13 general contractor with most of the actual work being performed by  
14 various subcontractors.

15 The lots are located on Woodfield Loop road which passes through  
16 the development. A job shack is located on lot number 2300 which is  
17 located at the entrance to the development from Hoffman Road.

18 II

19 On October 31, 1991, at approximately 2:50 p.m., the Olympia Fire  
20 Department, with Lieutenant Higson in charge, responded to a call and  
21 went to Woodfield Estates where a small "hand-warming" fire of  
22 construction wood scraps was found burning on lot 2306. A house was  
23 under construction on the lot, and the fire was on the lot's then  
24

25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

(2)

1   uncompleted driveway.

2                                   III

3           After the fire was extinguished, Lieutenant Higson contacted a  
4   person whom he assumed to be a worker in the area. This worker  
5   directed him to another worker who came down from a ladder. The  
6   Lieutenant, assuming that this second worker was the foreman or person  
7   in charge, informed him of the illegality of the fire. This second  
8   person took the Lieutenant to the job shack, three lots away from the  
9   fire location, where the Lieutenant identified the owner of the  
10  development as West Bay Construction, telephone number 206-459-7951.

11                                  III

12           Lieutenant Higson did not identify either the first or second  
13  worker either by name or as employees of West Bay, did not recall  
14  checking a building permit for the lot on which the fire was burning,  
15  and took no photographs of the scene at that time. He did not issue a  
16  citation since that is not a function or responsibility of the Fire  
17  Department.

18                                  IV

19           At the time of the incident, West Bay had only two employees  
20  assigned to the Woodfield Estates site. One worker was a coordinator  
21  and scheduler who was on the site that day only 3 to 4 hours, and who  
22  testified that during that time she did not see either the fire or the  
23  fire truck.

24  
25  FINAL FINDINGS OF FACT,  
26  CONCLUSIONS OF LAW AND ORDER  
27  PCHB NO. 92-11

V

The other West Bay worker described himself as a laborer who worked on different lots at different times with one of his duties being the disposal of waste. He testified that he did not see, did not see, and was unaware of the fire, and that he did not talk to the Lieutenant, but that he did see the fire truck. However, in what could be a direct contradiction of his previous testimony, he then testified that the fire (which he previously testified he was unaware of) was extinguished at the time he saw the truck. We assume instead that his testimony was not contradictory but was to the effect that he was unaware of the fire while it was still burning but did become aware of it after it had been extinguished. He further testified that that there were a number of subcontractor workers present.

VI

West Bay rents a dumpster which is kept on site for disposal of scraps and which is periodically emptied. West Bay also periodically has brush removed by Branning Trucking. These services cost West Bay approximately \$2,500 per month.

VII

OAPCA has at least one Inspector, Mr. Greg O'Connor, but it is not OAPCA's practice or procedure for an Inspector to go to the site of a fire and make an investigation at the time of the incident.

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

(4)

1 Instead, OAPCA takes no action on an alleged burning violation until  
2 it receives an Incident Report from the Fire Department.

3 As of June 15, 1991, all outdoor burning in Olympia was  
4 prohibited, and this order was still in effect on October 10, 1991.  
5 Upon receiving a Fire Department Incident Report of the November 31,  
6 1991 Woodfield Estates fire, Inspector O'Connor issued Notice of  
7 Violation-Citation No. 2128, countersigned by Charles Peace, OAPCA  
8 Control Officer, to West Bay by certified mail. West Bay was cited  
9 for being in violation of Section 9.01 of OAPCA's Regulation I by  
10 "Burning in a No Burn Area (City of Olympia)".

11 VIII

12 The Citation form carries the statement:

13 *Violation of Regulation I...carries a civil penalty of up*  
14 *to \$10,000. You will be sent a notification by letter*  
15 *setting forth the penalty to be assessed for the above*  
16 *violation after 30 days have passed. You have the right*  
*to meet with an OAPCA representative to discuss the matter*  
*at any time in the 30 day period following your receipt*  
*of this notice.*

17 Neither Mrs. Ingersoll nor any other representative of West Bay  
18 exercised the right of meeting and discussing the incident with OAPCA  
19 within the 30 day period. Mrs. Ingersoll did question some, but not  
20 all, of her subcontractors about the origin of the fire.

21 IX

22 On January 7, 1992, Mr. Charles Peace, the OAPCA Control Officer,  
23 issued a Notice of Civil Penalty Assessment to West Bay. After  
24

25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

(5)

1 stating, incorrectly, that "Inspector Greg O'Connor " had visited the  
2 site (Woodfield Estates) on the day of the fire, the Notice charged  
3 West Bay with violation of Section 9.01 of Regulation I, subject to a  
4 penalty of \$3,000 with \$1,000 suspended if no violations occur with a  
5 2 year period.

6 The amount of \$3,000 was arrived at because of two former burning  
7 violations by West Bay on March 23, 1990 and June 14, 1990, in  
8 accordance with OAPCA's Civil Penalty Guidelines effective October 9,  
9 1991.

10 X

11 From this Notice West Bay filed a timely appeal with this Board.

12 XI

13 On May 19, 1992, more than six months after the alleged  
14 violation, OAPCA Inspector O'Connor visited the Woodfield Estate site  
15 accompanied by Lieutenant Higson, took photographs, and marked one of  
16 them in accordance with information given to him by the Lieutenant.  
17 This was Mr. O'Connor's one and only visit to the site.

18 XII

19 Any Conclusions of Law deemed to be a Finding of Fact is hereby  
20 adopted as such. From these Findings of Fact the Board makes these

21 CONCLUSIONS OF LAW

22 I

23 This Board has jurisdiction over the parties and subject matter  
24

25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
27 PCHB NO. 92-11

1 of this appeal. RCW 43.21B.310. Because this is an appeal from the  
2 imposition of a penalty, respondent OAPCA has the burden of proof.

3 II

4 From the evidence presented by the parties, we conclude that  
5 OAPCA has met its burden of proving that, during a No Burn period in  
6 the City of Olympia, a small prohibited fire occurred in the  
7 development known as Woodfield Estates which is the property of and  
8 being developed by West Bay.

9 Our conclusion is based on Lieutenant Higson's unrebutted  
10 testimony of the time, place, and nature of the fire. We place no  
11 reliance on the photographs taken six months later by Mr. O'Connor  
12 which were not based on his own knowledge but entirely on information  
13 from the Lieutenant. While of some illustrative value, they have no  
14 evidentiary value.

15 III

16 The next issue to be resolved is whether West Bay is liable for  
17 the penalty imposed by OAPCA.

18 OAPCA Regulation I, Section 9.01, Open Fires, provides that "No  
19 person shall cause or allow any open (prohibited) fires..." (emphasis  
20 added). Based upon the testimony of its two employees at the site,  
21 West Bay contends that neither of those employees "caused or allowed"  
22 the fire on October 31, 1991, and claims that West Bay, therefore, is  
23 neither responsible for the fire nor liable for the penalty.

24  
25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

(7)

1 This issue is a question of law: is a general contractor  
2 responsible for a fire on property which it owns and is developing  
3 even though neither the general contractor nor its employee, in person  
4 or by acquiescence, caused or permitted the fire to be started?

5 IV

6 We quote OAPCA's Regulation I, Section 9.01(e):

7 *It shall be prima facie evidence that the person who owns*  
8 *or controls property on which open fire, prohibited by this*  
*Regulation, occurs has caused or allowed said open fire.*

9 We stated earlier that the burden of proof in this matter lay  
10 with OAPCA. However, the above presumption shifts the burden of proof  
11 to West Bay, as the owner of the property, to show that the fire was  
12 caused or allowed by the actions of another.

13 V

14 The only evidence presented by West Bay which would be relevant  
15 to such proof were general statements that Woodfield Estates has been  
16 vandalized in the past by intruders, including neighborhood children.  
17 There was no evidence that such persons were present on the site on  
18 the day of the fire in question.

19 There was evidence from West Bay that subcontractor workers were  
20 present the day of the fire, but there was no evidence as to the names  
21 of any of these individuals nor that any of them caused or allowed the  
22 fire the fire to be started.

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24  
25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
27 PCHB NO. 92-11



1 VI

2 We conclude that West Bay has failed to carry its burden of proof  
3 that some party or parties other than West Bay caused or allowed the  
4 fire, and we further conclude that OAPCA's Notice of Civil Penalty  
5 Assessment was properly and for good cause directed to West Bay.

6 VII

7 We are further supported in our conclusion by precedent  
8 established in former decisions of this Board, one of which is Ken  
9 Pearson Construction, Inc. v. Puget Sound Air Pollution Control  
10 Authority, PCHB No. 88-186 (1988), where we held that:

11 *The Washington Clean Air Act is a strict liability*  
12 *statute. Acts violating its implementing regulations*  
13 *are not excused on the basis of intent. Moreover, the duty*  
*to comply cannot be delegated away by contract.*  
*(cites omitted, emphasis added.)*

14 The import of this precedent in the matter at hand is that, even  
15 if West Bay could have established that the fire was caused by one or  
16 more of its subcontractors (which it did not), West Bay would not  
17 necessarily have been absolved from sharing the responsibility for  
18 violation.

19 VIII

20 We take notice of the fact that none of the parties or persons  
21 involved in this matter, according to the evidence, seemed much  
22 concerned or took any steps to try to determine who actually did start  
23 the fire.

24  
25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

The only investigatory effort by Lieutenant Higson seems to have been his effort to find out who owned the property. He did not establish the names of the two workers he talked with nor whom they worked for, although they might possibly have been able to identify and testify to the perpetrator. The West Bay employee who saw the truck and the extinguished fire did not talk with the Lieutenant or anyone else, according to his testimony, about the cause of the fire. Mrs. Ingersoll neither contacted OAPCA during the thirty day waiting period between the Citation and the Notice nor did she talk to all of her subcontractors, either of which actions might have been a source of identification. There is no evidence to show that any OAPCA personnel talked with the Lieutenant or anyone else about the fire until the Inspector's visit to the site six months after the occurrence or that any other attempt at investigation was made by OAPCA personnel.

## IX

If, as is generally stated, the predominant purpose of a penalty is to discourage future violations by the perpetrator, that purpose is partially defeated when the actual perpetrator is not identified even though full liability can still be assigned to the property owner. We recognize that, even if an investigation or investigations had been conducted, the perpetrator might not have been identified. However, in this matter, where there is no evidence of such an investigation

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHE NO. 92-11

1 which may have led to shared liability between the perpetrator and  
2 West Bay, we conclude that mitigation will be granted where,  
3 otherwise, none would have been because of the two previous illegal  
4 burning violations by West Bay.

5 X

6 Further, while we have no jurisdiction to order, we do recommend  
7 that OAPCA review its operating procedures and forms. If the  
8 testimony of Fire Department personnel is to be relied on rather than  
9 the active investigation by OAPCA personnel, some mutual understanding  
10 should be reached as to information which should be gathered at the  
11 site of the violation so that, if possible, responsibility can be  
12 assigned to the actual perpetrator rather than relying on the  
13 Regulation to assign full responsibility to the property owner.

14 We further recommend that the Notice form be reviewed and revised  
15 so that it contains fully correct information rather than, as in this  
16 case, the name of an OAPCA Inspector who did not visit the site until  
17 six months after the violation date cited on the Notice. We do not  
18 find or conclude that, in this case, the incorrect entry constitutes  
19 improper notice of a weight to warrant dismissal in favor of appellant.

20 XI

21 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
22 adopted as such. From these Conclusions of Law the Board enters the  
23 following

24  
25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

(11)

ORDER

THAT Olympia Air Pollution Control Authority's Notice of Civil Penalty of January 7, 1992, to West Bay Construction Company is AFFIRMED, but

THAT \$1500 of the \$3,000 penalty imposed is suspended on condition that West Bay has no further burning violations for two years from the date of this ORDER.

DONE this 2nd day of July, 1992.

POLLUTION CONTROL HEARINGS BOARD

Harold S. Zimmerman  
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee  
ANNETTE S. MCGEE, Member

John H. Buckwalter  
JOHN H. BUCKWALTER  
Administrative Law Judge  
Presiding

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FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-11

(12)